No. 89-1907

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

RUSSELL F. MANFREDI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

To Be Argued By:

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QUESTIONS PRESENTED

I. WHEN A CRIMINAL DEFENDANT HAS PLACED HIS MENTAL CAPACITY AT ISSUE CAN THE STATE USE THE RESULTS OF A COURT ORDERED PSYCHIATRIC EXAMINATION OF THAT DEFENDANT FOR THE SOLE PURPOSE OF REBUTTING ANY PSYCHIATRIC DEFENSES PERMITTED UNDER STATE LAW WITHOUT VIOLATING THE DEFENDANT'S FIFTH AMENDMENT RIGHTS?

II. WHERE A DEFENDANT INTERPOSES A DEFENSE TO A MURDER CHARGE CLAIMING HE LACKED THE MENTAL CAPACITY TO FORM INTENT BECAUSE OF A MENTAL DISEASE OR DEFECT, CAN HE GAIN REVIEW OF HIS UNPRESERVED CLAIM THAT THE JURY SHOULD NOT HAVE BEEN GIVEN ANY INSTRUCTION ABOUT THE USE OF PSYCHIATRIC TESTIMONY IN DETERMINING WHETHER HE HAD A MENTAL DISEASE OR DEFECT THAT INTERFERED WITH HIS ABILITY TO FORM INTENT?

III. DOES A DEFENDANT HAVE A SIXTH AMENDMENT RIGHT TO COUNSEL'S PRESENCE DURING A COURT ORDERED PSYCHIATRIC EXAMINATION PURSUANT TO UNITED STATES V. ASH. 413 U.S. 300 (1973) AND UNITED STATES V. WADE, 388 U.S. 218 (1967)?

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STATEMENT OF THE CASE

Respondent relies on the statement of the case set forth by the Connecticut supreme court in State v. Manfredi, 213 Conn. 500, 401-509 (1990), and reproduced in petitioner's appendix at pages 2A to 10A for the first question presented. As to the remaining questions presented, respondent sets forth the following.

"At trial, the [petitioner] took the stand and admitted that he had, in fact killed his wife. The defense therefore focused almost exclusively on his claims of insanity and extreme emotional disturbance." State v. Manfredi, Pet. App. 7A-8A.[1]

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[1]. Both of these are affirmative defenses under Connecticut law resulting in a defendant carrying the burden of

(continued...)

With these defenses as the contested issues in the case, the trial court instructed the jury that the state had the burden of proving each element of the crime beyond a reasonable doubt. It cautioned the jury that, despite the petitioner's admission that he caused his wife's death, the burden of proof on each element of the crime remained with the state. The jury was told to return a verdict of not guilty if the state failed to meet its burden of proof beyond a reasonable doubt.

After hearing the elements of murder, the jury was instructed on insanity and the petitioner's burden of proof on it. Immediately thereafter,

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[1](...continued)
proof on each defense raised. Connecticut General Statutes §§ 53a-13; 53a-54a. Pet. App.1D-2D.

the trial court informed the jury that even if the petitioner did not meet his burden of proof on the insanity defense it could still consider the psychiatric evidence to determine whether the state established intent beyond a reasonable doubt. The jury was then instructed on the affirmative defense of extreme emotional disturbance.

As required by Connecticut practice; Connecticut Practice Book § 852; petitioner raised several objections to the instruction. There was no objection, however, to the fact that the instruction which is now challenged on appeal was given. Respondent's App. at B1-B13. Instead petitioner requested a clearer and more expansive statement about the state's burden of proving beyond a reasonable doubt "that there

wasn't any defect present or any other obstruction present that made it impossible for the actor, in this case the [petitioner], to form an intent; and that that obligation... is on the state...beyond a reasonable doubt." Resp. App. B8-B9. At the trial court's request, petitioner reiterated his complaint that the jury was not instructed on the state's burden of proving that petitioner's mental defect did not interfere with his ability to form the requisite intent. Resp. App. at B14-15. The trial court was willing to clarify this point. Resp. App. B15, B17.

In its supplemental instruction, the trial court told the jury it must apply the psychiatric evidence "to the question of whether or not the state has disproved the question of insanity where

that is necessary." Resp App. B-20. The court went on to state:

> And if, however, you find that you have a doubt as to the mental condition of insanity or the [petitioner's] mental condition of having a mental disease or defect [sic] in that connection, the state has the burden of proving each element of the crime which would include that.

Resp App. B20-21. There was no objection to this instruction. Thereafter, the jury returned its verdict, finding the petitioner guilty of manslaughter in the first degree under extreme emotional disturbance. Connecticut General Statutes §53a-54a(a); 53a-55(a)(2). Resp. App. A2, A5.

CONNECTICUT APPELLATE PROCEEDINGS

Petitioner appealed his conviction, as a matter of right, to the Connecticut appellate court. As to the first question presented, the appellate court

found error in the trial court's determination that this was "an appropriate case" under Connecticut Practice Book §760 Resp. App. A5; to order a psychiatric examination on behalf of the state, deciding instead that said order was premature. State v. Manfredi, 17 Conn. App. 602, 613 (1989); Pet. App. 12B. It further held, however, that the error was harmless. Pet App. 16B-19B.

The appellate court refused to review the merits of the second question presented because petitioner failed to preserve it properly under state procedural rules. Pet. App. 20B-24B.

The appellate court also ruled that petitioner had no sixth amendment right to either counsel's presence at or a recordation of a psychiatric examination

ordered under Connecticut Practice Book § 760.

Petitioner raised all three claims in a petition for certification to the Connecticut supreme court. Pet. App. 9A n.9. The supreme court granted certification limited to the following issue:

> Did the appellate court err in sustaining the admission of expert psychiatric testimony elicited by the state in advance of the filing of notice of intent to rely on a defense of mental disease or defect?

Pet. app. 3A n 2. Respondent reserved the following issue for review:

> Whether this was an appropriate case under Practice Book § 760 for the trial court to order a psychiatric examination prior to the defendant's assertion of a mental disease or defect under Practice Book § 759?

Id. The supreme court reversed the appellate court's ruling but upheld its judgment: holding that the trial court ordered the psychiatric examination at an appropriate time. Pet. App. 15A.

REASONS FOR DENYING THE PETITION

IA. AS TO THE USE OF THE COURT ORDERED PSYCHIATRIC EXAMINATION, THE CONNECTICUT SUPREME COURT DID NOT DECIDE A FEDERAL QUESTION.

This Court's rules augur against granting certiorari where the state's highest court has not decided a federal question. 10.1 (b). In this case, the Connecticut supreme court decided, in the first instance, that "an appropriate case" for a court to order a psychiatric examination under Connecticut Practice Book §760 [2] included those instances where a defendant has not yet asserted a recognized insanity defense. Pet. App. 10A-11A. A state supreme court is

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2. Connecticut's practice book sections dealing with notice of psychiatric defenses and court ordered psychiatric examinations of a defendant are derived from and almost a mirror image of Rule 12.2(c) Fed. R. of Crim. Pro. Orland, Connecticut Practice Annotated §760.

the final arbiter of the meaning of its own rules, and its determination does not present a federal question worthy of certiorari review.

With this issue decided, the Connecticut supreme court then affirmed the petitioner's conviction by analyzing the his conduct in light of Connecticut Practice Book § 760. The court determined that the petitioner "had placed his mental status at issue before the trial court ordered him to undergo psychiatric examination." Pet. App. 15A.

Contrary to the petitioner's assertion, this holding did not resolve a unique federal constitutional question. This court has indicated repeatedly that once a defendant places his mental capacity at issue a trial court may

order a psychiatric examination, and the state may use the results of the examination to rebut mental status defenses without infringing on a defendant 's Fifth Amendment rights. Buchanan v. Kentucky, 483 U.S. 402, 421-424 (1987); Estelle v. Smith, 451 U.S. 454, 466-67, (1981); see also Powell v. Texas, U.S. , 109 S. Ct. 3146, 3149 (1989).

The Fifth Amendment question petitioner is attempting to latch onto, which was left open by Estelle v. Smith, is whether the state can use the results of a psychiatric examination ordered before a defendant places his mental status at issue without violating the defendant 's Fifth Amendment rights. 451 U.S. at 457 n.1. However, neither Estelle nor any subsequent decision of

this court presents a bar to using the results of a psychiatric examination ordered after a defendant places his mental status at issue. That the Connecticut court avoided the Fifth Amendment issue left open in Estelle v. Smith is expressly revealed by the decision below. Pet. App. at 15A N.12.

Therefore, the Connecticut supreme court did no more than apply the facts of the case to the terms of the Connecticut Practice Book within well established constitutional parameters. In light of the supreme court's failure to decide a unique federal question, this Court should not grant certiorari on the first question presented. Rule 10.1(c).

Finally, both the appellate court, and one justice of the supreme court held that the state's psychiatrist

learned the same information from the "proper" post-notice psychiatric examinations as he did from the "improper" pre-notice examinations. Pet App. at 25A; 19B. Thus, even if there was constitutional error in the supreme court's interpretation of Connecticut Practice Book § 760, any such error was harmless to petitioner.

B. The Decision Below Is Consistent With Decisions Of This Court And Federal Courts Of Appeal

Even if this court were to conclude that the Connecticut court reached the Fifth Amendment issue as framed above, there is no need for further review. This court reserves its valuable time for those cases wherein the state's highest court decides a federal question in a manner inconsistent with this court or other federal courts of appeal. Rule

10.1(b) & (c). No such conflict is presented by this question.

Last year, this Court indicated that a petitioner has no valid Fifth Amendment claim when the results of his pre-notice examination are used in response to a defense of mental disease or defect. Powell v. Texas, supra, 3149. This conclusion was consistent with and suggested by prior decisions of this court which distinguish between the impermissible use of examination results against a defendant who does not interpose a psychiatric defense; Estelle v. Smith, supra, 1875 and the permissible use of examination results against one who asserts such a defense. Buchanan v. Kentucky, supra, 2917-18).[3]

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3. "'A criminal defendant, who neither initiates psychiatric evaluation (continued...)

Moreover, federal courts have consistently upheld, albeit for various reasons, the use of information from compelled psychiatric examinations to rebut psychiatric defenses raised at trial.[4] United States v. Byers, 740 F. 2d 1104, 1111-1113 (plurality opinion)

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[3](...continued)
nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist and his statements cannot be used against him at a capital sentencing proceeding.' [Estelle v. Smith], 468, 102 S. Ct. at 1875. This statement logically leads to another proposition: if a defendant requests such an examination or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." Buchanan v. Kentucky, supra at 2917-18.

[4]. A more exhaustive discussion of the various rationales rejecting the Fifth Amendment claim proffered by the petitioner is found in United States v. Byers, 740 F. 2d 1104, 1111-1113 (D.C. Cir. 1984).

(Scalia, J.) (Fairness to government); United States v. Stockwell, 743 F. 2d 123, 126 (2d Cir 1984) (Where use of examination limited to rebutting psychiatric claim, no Fifth Amendment entanglements); United States v. Madrid, 673 F. 2d 1114, 1121 (10th 1982) (Once defendant offers insanity evidence psychiatric testimony on behalf of the government cannot be muzzled on 5th amendment grounds);[5]

The legitimacy of a compelled examination is unaffected by when in the proceedings the initial order is made. United States v. Henderson 770 F.2d 724, 728 n.4 (8th Cir. 1984) (district court

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[5] In accord: United States v. Cohen, 530 F. 2d 43,47 (5th Cir) cert denied, 429 U.S. 855 (1976); United States v. Trapnell, 495 F. 2d 22, 24 (2d Cir. 1976); See also United States v. Malcolm, 475 F. 2d 420, 427 (9th Cir. 1973).

has authority to order a contemporaneous psychiatric examination); United States v. Reason, 549 F.2d 309 (4th Cir. 1977) (where defendant requests a psychiatric examination to determine competency court may order a dual purpose for competency and sanity); United States v. Lincoln, 542 F.2d 746 (8th Cir.), cert. denied, 429 U.S. 1106 (1976) (district court had authority to order a dual purpose examination despite fact that defendant had yet to declare an intention to raise an insanity defense);

[6] It is the uses to which the defendant's statements (made during the

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[6] United States v. Reifsteck, 535 F.2d 1030 (8th Cir. 1976) ; United States v. Moudy, 462 F.2d 694 (5th Cir. 1972); Winn v. United States, 270 F.2d 326 (D.C. Cir. 1959); United States v. Hinckley, 525 F.Supp. 1342 (D.D.C. 1981), aff'd, 672 F.2d 115 (D.C. Cir. 1982)

examination) are put and not the timing of the examination which determines whether the defendant's protection against self-incrimination has indeed been violated. See United States v. Leonard, 609 F. 2d 1163, 1165 (5th Cir. 1980).

These decision unanimously support the Connecticut supreme court's conclusion that once petitioner placed his mental status in issue, the state was entitled to use the results of all psychiatric and psychological tests to rebut the defense without implicating petitioner's Fifth Amendment rights.[7]

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[7] Indeed, by decreeing that extreme emotional disturbance and insanity are affirmative defenses, Connecticut has constitutionally shifted the burden of proof on these issues to the defendant. Patterson v. New York, 432 U.S. 197, 211 (1977). Where statements are not used for an incriminating purpose, petitione-

(continued...)

Under the facts of this case, where petitioner places his mental status at issue early in the proceedings, admits to the killing, relies solely on psychiatric defenses, and offers detailed psychiatric testimony, there is no conflict among the decisions of this Court or the circuits about permitting the use of the results a court ordered examinations to rebut the psychiatric defenses presented. Certiorari should not be granted on the first question presented.

II WHERE PETITIONER DOES NOT COMPLY WITH STATE PROCEDURAL RULES HE SHOULD NOT GET REVIEW OF HIS JURY INSTRUCTION CLAIM

Along with the insanity defense, a Connecticut murder defendant may also claim that he suffered from a mental

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[7](...continued)
r's Fifth Amendment rights are not implicated.

disease or incapacity which rendered him incapable of forming the specific intent to murder. Connecticut General Statutes §53a-54(a) Connecticut Practice Book § 759, Resp. App. A5-A6. The state bears the ultimate burden of proving intent beyond a reasonable doubt.

The appellate court noted correctly that petitioner failed to take an exception to the instruction that the psychiatric evidence could be considered on whether petitioner had the mental capacity to form intent. Connecticut Practice Book § 852. Pet. App. at 20B. Contrary to petitioner's argument; Pet. at 19; his response to the jury instructions given at trial makes it very apparent that he wanted to take full advantage of this defense to murder. Petitioner encouraged the giving of and was satisfied

with the trial court's final instruction on the state's burden of overcoming any mental disease and defect on its way to proving intent. Resp. App.B8-9; B14.

Therefore, the Connecticut appellate court acted appropriately when it invoked the state's procedural bar rule, as enunciated in State v. Evans, 165 Conn. 61 (1973), and refused to entertain the merits of his belated challenge to the jury instruction. Pet. App. 20B-24B. "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court..." Michigan v. Tyler, 436 U.S. 509, 512, n.7 (1978); compare, Connecticut v. Johnson, 460 U.S. 73, 80, n. 8 (1983)(Where state court grants review under State v.

Evans, supreme court can consider federal question). Certiorari shculd not be granted for this unpreserved claim. Ellis v. Dixon, 349 U.S. 458, 474, (1955).[8]

III. THE CIRCUITS HAVE UNANIMOUSLY REJECTED A CLAIM THAT DEFENDANT'S HAVE A SIXTH AMENDMENT RIGHT TO COUNSEL AT A COURT ORDERED PSYCHIATRIC EXAMINATION

Petitioner claims that he has a Sixth Amendment right to counsel's presence at a psychiatric examination

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[8] On this issue, it is of no consequence that the government must prove the defendant capable of forming the requested intent. This is established by looking at federal decisions which pre-date the Insanity Defense Reform Act Pub. L. 98-473, Title II §402 (a). United States v. Freeman, 804 F 2d 1574 (11th Cir. 1986). In those days, courts allowed the use of compelled psychiatric examinations to rebut the mental defense raised by a defendant even though the government had the burden of proof on the issue of sanity. United States v. Byers, 740 F2d 1104, 1111,-1114 (D.C. Cir. 1984) (and cases cited therein).

because it is a "critical stage" of the proceedings." Pet at 25. He argues that counsel's presence and passive observation will enhance his ability to attack the examination and the psychiatric conclusions at trial. Pet at 28-29. The "critical stage" analysis proposed is derived from this court's decisions in United States v. Ash, 413 U.S. 300 (1973) and United States v. Wade, 388 u.S. 218 (1967). His claim is not worthy of certiorari.

Although this Court has yet to decide whether a defendant has a Sixth Amendment right to counsel's presence at a court ordered psychiatric examination, it has indicated a favorable disposition towards the resolution of this claim by lower federal courts. Estelle v. Smith, at 470,n 14. Every federal court which

has considered this issue has agreed that no such right exists under the Sixth Amendment. Williams v. Lynaugh, 809 F. 2d 1063 (5th Cir.) cert. denied, 107 S. Ct. 1635 (1987); United States v. Byers, supra, (plurality opinion); Cape v. Francis, 741 F. 2d 1287 (11th Cir. 1984); Hollis v. Smith, 571 F. 2d 685 (2d Cir. 1978); United States v. Greene, 497 F. 2d 1068 (7th Cir 1974) cert denied 420 U.S. 909 (1971).[9] See also 3 A.L.R. 4th, 910 at 920. Where there is no conflict in the federal decisions on an issue this Court has no

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[9]. Many of these circuits have decided this issue more than once, all finding no Sixth Amendment right to counsel's presence at a court ordered examination. i.e. Vardas v. Estelle, 715 F. 2d 1287 (5th Cir 1983) cert. denied 465 U.S. 1104 (1984); United States v. Baird, 414 F. 2d 700 (2d Cir. 1969) cert. denied 396 U.S. 1005.

reason exercise its discretionary jurisdiction. Rule 10.1(b).

Petitioner's attempt to create conflict where none exists, by citing several cases recognizing the right he claims under the Sixth Amendment, does not support his request for certiorari. Pet. at 22. n. 21. For instance, Lee v. County Court of Erie, 267 N.E. 2d 452 (NY 1971) was decided between this Court's decisions in Wade and Ash. As explained in Byers, this Court's decision in Ash rejected any notion in Wade that the purpose of counsel's presence at pre-trial proceedings was to permit reconstruction of these events at trial. United States v. Byers, supra, 1117.

Sheppard v Bowe, 442 P.2d 238 (Or. 1968), also cited by petitioner, re-

quired counsel's presence on Fifth rather than Sixth Amendment grounds. The strictly limited use of statements from psychiatric examination found in Connecticut Practice Book §760 negates any concern that petitioner's Fifth Amendment rights need protection. State v. Boscarino, 206 Conn. 714, 736-737, 529 A. 2d 1260 (1987).

Houston v. State, 602 P. 2d 784, (Alaska 1979) is a decision invoking Alaska's state constitution. See Also State v. Jackson, 298 S. E. 2d 866, 872(W.VA. 1982). State's are free to afford their citizens greater protections than those granted under our federal constitution. Michigan v. Long, 463 U.S. 1032,1037-38 (1983). By construing their constitutions more expansively, however, a state does not bring

its highest court into conflict with the federal judiciary deciding the same questions under federal law.

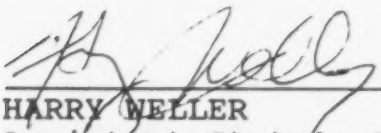
Given the complete rejection of this question by all circuits which have decided it, there is no need for further review by this Court. Rule 10.1(b).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Connecticut supreme court should be denied.

Respectfully Submitted,

Respondent State of Connecticut

By 

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APPENDIX A

Connecticut General Statutes

§53a-13. Lack of capacity due to mental disease or defect as affirmative defense.

(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.

(b) It shall not be a defense under this section if such mental disease or defect was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor or any drug or substance, or any combination thereof, unless such drug was prescribed

for the defendant by a licensed practitioner, as defined in section 20-184a, and was used in accordance with the directions of such prescription.

(c) As used in this section, the terms mental disease or defect do not include (1) an abnormality manifested only by repeated criminal or otherwise antisocial conduct or (2) pathological or compulsive gambling.

§53a-54a. Murder defined. Affirmative defenses. Evidence of mental condition. Classification.

(a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defen-

dant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent

to cause the death of another persor.

(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony.

§53a-55. Manslaughter in the first degree: Class B felony.

(a) A person is guilty of manslaughter in the first degree when: (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circum-

stance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection.

§759. Mental disease or defect inconsistent with the mental element required for the offense charged.

If a defendant intends to introduce expert testimony relating to a mental disease or defect, or another condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the judicial authority may direct, notify the prosecuting authority in writing of such intention and file a copy of such notice with the clerk. He shall also furnish the prosecuting authority with

copies of reports of physical or mental examinations of the defendant made in connection with the offense charged, within five days after receipt thereof. The judicial authority may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

§760. Psychiatric examination.

In an appropriate case the judicial authority may, upon motion of the persecuting authority, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the defendant in the course of any examination provided for by Sec. 757, whether the examination shall be with or without the

consent of the defendant, shall be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding. A copy of the report of the psychiatric examination shall be furnished to the defendant within a reasonable time after the examination.

§852. Necessity for requests to charge and exceptions.

The supreme court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection. Upon

request, opportunity shall be given to present the exception out of the hearing of the jury.

Rules of the Supreme Court of the United States

Rule 10. Considerations governing review on writ of certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the

same matter; or had decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Federal Rules of Criminal Procedure

Rule 12.2. Notice of insanity defense or expert testimony of defendant's mental condition.

(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert testimony of defendant's mental condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental examination of defendant. In an appropriate case the court may, upon motion of the attorney for the

government, order the defendant to submit to an examination pursuant to 18 U.S.C. 4241 or 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceedings except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) Failure to comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any

expert witness offered by the defendant on the issue of the defendant's guilt.

(e) Inadmissibility of withdrawn intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

APPENDIX B

Transcript

****

[3102] MR. BAILY: No exceptions, your Honor.

THE COURT: As given by the Court.

MR. BAILY: No exceptions.

THE COURT: Mr. Daly.

MR. DALY: Yes, your Honor. Before I begin with any exceptions, I would like to include the exceptions I made to your Honor's original charge where they are applicable. It may be that your Honor finds that an insufficient way to alert you to what I am complaining about, and if so, after I get through with the notes I've made here, I'll attempt to be more

specific. Maybe I ought to start and --

THE COURT: Pardon.

MR. DALY: Maybe I ought to be specific, and then maybe your Honor can decide whether or not you think that is specific enough or whether I should go back to the complaints I made about the original charges.

THE COURT: Why don't you proceed.

MR. DALY: All right. Well, in your Honor's charge on murder, I take exception to your Honor's failure to charge in accordance with my very first request which would have included the admonition to the jury that you [3103] are not required to infer intent from the accused's conduct. The burden o

proving intent beyond a reasonable doubt is on the state.

In addition, if your Honor pleases, in charging them on the question of intent, your Honor said, if I remember the sequence correctly, you can't look into a person's mind, and you then said, as I wrote it down, we must infer the intent from the surrounding circumstances since we can not look into his mind. I take exception to your Honor's failure to add at that time that the lack of intent should also or can also be inferred the very same way, from looking at all of the circumstances, those that precede the event, that took place during the event and that took place after it. In other words,

inference or inferences which they can use certainly can be used as well to determine there was no intent, as that there was intent, and I don't believe that is something that your Honor told them.

All right. I also want to take a general exception, and I am going to be more specific to your charging the jury that the burden of proving insanity was on the defendant, and [3104] that the burden of proving extreme emotional disturbance was on the defendant. I'll get to that in a minute.

Before I do, I'd like to except your Honor's failure to charge -- In reviewing these statutory claims with the jury, I'd

except to your Honor's failure to charge in accordance with my request number 5, and that is I instruct you if there is any conclusion available to you which is consistent with the innocence of the accused, that is a conclusion which you must reach.

Now, if your Honor pleases, as soon as you got through with the issue of whether or not murder had been proved, you went into the issue of mental defect or disease. Now, it seems to me that the manner in which you postured you remarks to the jury about mental disease or defect would have led the jury to believe that the only crime to which that was a defense is the crime of murder. Now, I appreciate,

however, that at the end of that charge on mental defect you said, if I remember correctly, something -- if you reach this conclusion, you should stop there because this is a defense to the commission of any [3105] crime, but then you went on to add, as I took it down, because that mental state negates the intent of his act. And again, it seems to me by your having said that to the jury, you're suggesting that the only crimes to which that would be a defense were those that require intent, and as you explained to them, I guess that would be murder and one part of manslaughter one.

Now, if your Honor pleases, you subsequently discussed with the

jury the question of extreme emotional disturbance. I would respectfully submit that the difference between extreme emotional disturbance and the so-called insanity defense is so sufficiently vague and unclear as to be unconstitutional, and I would think that the instructions -- I respectfully suggest that the instructions should have included the observation that insanity, obviously, includes those elements of which you discussed within emotional extreme disturbance, but insanity rises to the level where it strips the actor, even momentarily, of his or her ability control his or her conduct.

Again, if your Honor pleases,

when you [3106] discussed intent, both in connection with the second part of the manslaughter one statute and the murder statute, I respectfully suggest that the jury was given very few guidelines on this question of intent, and I would take exception to your Honor's failure to charge the jury that in order to find intent or in order to form intent, the actor or actors, in this case the defendant, would have to have the ability, the mental and emotional ability to form an intent, that the state would have to prove beyond a reasonable doubt that there wasn't any defect present or any other obstruction present which would have made it impossible for the

actor, in this case this defendant, to form an intent; and that that obligation is an obligation that is on the state, and that it's on the state beyond a reasonable doubt.

In discussing the third element of manslaughter one -- That is not correct. In discussing the third offense included within manslaughter one, that being the reckless business, while your Honor did explain some of those terms, I would respectfully suggest that your Honor did not mention that portion of the [3107] statute which deals with the actor or actors, in this case the defendant, being aware of the results of his or her consequences. And I would take exception to your Honor's failure

to charge that being aware of requires a mental state which would insure that in this ca se the defendant could appreciate the gravity, as you've already explained it to them, of the situation before him, and that this obligation to prove that the defendant could be aware of that is an obligation that rests on the State of Connecticut to prove beyond a reasonable doubt.

I think quite inadvertently, if your Honor pleases, while your Honor was giving them the summary- and I noted if that is of any help to either Mrs. Buscetto or you that it was at 12:37 on this clock when you said it. In summary when you summarized mental defect and

extreme emotional disturbance you said if you fail to find that those defenses were proved beyond a reasonable doubt, go on. Now, I think that was inadvertent on you Honor's part because earlier you did say to them clearly that it was the defense's obligation by a fair preponderance of the [3108] evidence to prove those. However, and as I am sure your Honor understands, I take exception to that too, but I certainly think it's the lesser of those two evils, the reasonable doubt business to which your Honor alluded in your summary.

Finally, if your Honor pleases, it strikes me that -- and I can't give you any authority--

that the manslaughter one statute which is almost a collage of crimes, one of which requires a specific intent, and the other which does not require any intent at all. Again, you know, those provisions are just sufficiently conflicting with one another as to be a violation of any defendant, in this particular case my defendant's constitutional rights. It just doesn't seem to me constitutionally permissible to have those absolutely opposite elements of a crime contained within the same statute.

Now, I would think, if your Honor pleases, that that includes all the exceptions that I have, and I would think it would include those that I made on Thursday when

your Honor instructed them; however, I left my notes back at my office, and I thought that

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[3111] negating, if proved, negating criminal responsibility, the Court feels that it adequately covered that in its instruction to the jury. You indicated a reference to your own exceptions or your request to charge on that same factor in your request to charge, and I think I did answer that not only after the first charge, but it would remain the same answer by the Court.

As to the fifth exception, the question of being unconstitutional, the Court has previously handled that section after the first

instruction to the jury.

The next exception I don't have with clarity. Could you reiterate that.

MR. DALY: I think the next one, if your Honor pleases, was that there was no instruction given by your Honor to the jury on the element of intent, and by that I meant to take exception to your Honor's failure to charge the jury that in order for the actor or actress to form an intent, that actor or actress would have to have mental ability to form such an intent, and that that is a matter that would have to be proved beyond a reasonable doubt, that that ability, the [3112] mental state of mind was present in the actor or

actress, in this case the defendant, at the time that the act was committed.

THE COURT: That I feel will be covered by the reinstruction on the question of inference to be drawn from the facts.

The seventh exception I will correct. I did go over the reporter's notes and I did indicate as to -- not the question of insanity defense, but as to the emotional disturbance defense, that the burden of proof was beyond a reasonable doubt.

As to your last exception, the Court believes the legislative power was to set the same type of level to three different methods of committing the charge of man-

slaughter in the first degree, and will not reinstruct on that.

MR. DALY: I would just like to add one thing. I think I said it on the record -- and I'll be through. On the question of intent and inference, my notes indicate that your Honor said we must infer -- We must infer intent from the surrounding circumstances, and all I am asking is that your Honor say to them you must infer intent or the lack thereof from...

****** [3113-3114] ******

[3115] ...[By The Court] emotional disturbance, the statute places the burden as to that affirmative defense on the defendant, and it's on the defendant by a fair preponderance of the evidence. At one

point I went over the Court Reporter's notes and I did lapse into in the summary that it had to be -- the extreme emotional disturbance had to be proved by proof beyond a reasonable doubt. The standard of proof by the defendant is placed on the defendant by a fair preponderance of the evidence as I've defined that term to you.

Now, in this connection, when you're considering the affirmative defense of sanity of insanity, this does not, the burden placed upon the defendant, diminish in any way the state's burden of proving each element of the crime either charged or the lesser included charges beyond a reasonable doubt; so the

burden is still on the state to rove each element of the charge and that's any charge, the one charge alleged or any lesser included charge, beyond a reasonable doubt.

And with those supplemental instructions, I'll ask you to continue deliberations.

(Whereupon the jury returned to the

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[3131][By The Court] The first possible verdict -- and this follows the sequence in which I've directed you in my instructions to follow. The first possible verdict is murder as charged. Now, I've indicated to you in my instructions that you must find each of the elements of murder beyond a

reasonable doubt in order to warrant a conviction of the first charge.

As to the second possible verdict, not guilty by reason of mental disease or defect, I've indicated to you in my instructions that the burden of proving that condition is on the defendant, and that is not by a fair preponderance of the evidence, but by -- I am sorry. Isn't beyond a reasonable doubt, but by the standard of fair preponderance of the evidence.

Now, as to that, however, you must consider that the condition known as insanity does apply to all criminal charges. So that condition of insanity being applied to all criminal charges, if found by you,

would apply to all criminal charges and, therefore, removes or negates the criminal responsibility of any criminal offense. It also must be applied to the question of whether or not the [3132] state has disproved the question of insanity where that is necessary.

So, when you're determining the question of not guilty by reason of mental decease or defect, first the burden is on the defendant to prove by a fair preponderance of the evidence that it does exist. And if that is found, then, of course, it's a finding of not guilty. And if, however, you find that you have a doubt as to a mental condition or insanity or the defendant's mental condition of

having mental disease or defect in that connection, the state has the burden of proving each element of the crime which would include that.

The next possible verdict is guilty of manslaughter in the first degree by virtue of extreme emotional disturbance. Again, I indicated that that is a burden of the defendant to prove that condition of the mind by a fair preponderance of the evidence, not by a standard beyond a reasonable doubt. Now, in this connection it only applies to the charge of murder. So, to consider that, you must have first found beyond a reasonable doubt each element of the charge of [3133] murder. Then if you determine by a fair prepond-

erance of the evidence that he acted under extreme emotional disturbance, it reduces the blame for murder to manslaughter in the first degree. So, in determining your third possible verdict, you will not consider the mental state of extreme emotional disturbance unless you first have determined beyond a reasonable doubt each element of the crime of murder. Only applies to the charge of murder.

The fourth possible verdict is manslaughter in the first degree as to intent to cause serious physical injury.

The fifth, manslaughter in the first degree with reckless indifference.

The sixth, manslaughter in the second degree by reckless conduct.

The seventh, guilty of criminally negligent homicide. All must be proved beyond a reasonable doubt in order to warrant a conviction.

And, of course, the eighth possible verdict is not guilty of any crime, that is murder or any lesser included crime under murder. And the eighth means that the state [3134] has failed to prove beyond a reasonable doubt any of the listed crimes.

If you have any questions concerning any of what I've just said, I expect another request.

Mr. Sheriff.

(Whereupon the jury was

excused.)

THE COURT: Mr. Appleton, any exceptions to the supplemental instructions as given by the Court.

MR. APPLETON: No, your Honor.

THE COURT: Mr. Daly?

MR. DALY: Well, if your Honor please, in your talking to the jury on their options under what you call the second and third verdicts, mental defect and extreme emotional disturbance, I except, as I did before, to your placing any burden whatsoever on the defendant, but with that exception --

THE COURT: On the same ground as previously --

MR. DALY: Yes.

THE COURT: And with that, the Court has already indicated its

response to Mr. Daly's exception to both those possible verdicts.

Court will stand in recess to await the . . .

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